Filed 4/7/09 Diamond Game Enterprises v. Whipple CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DIAMOND GAME ENTERPRISES, INC., Plaintiff and Respondent, v. STEWART M. WHIPPLE, JR., Defendant and Appellant.	B203687 (Los Angeles County Super. Ct. No. BC322615)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Terry A. Green, Judge. Dismissed in part; affirmed in part.

George A. Juarez; Cole Pedroza, Curtis A. Cole and Joshua C. Traver for Defendant and Appellant.

Hunton & Williams and Phillip J. Eskenazi for Plaintiff and Respondent.

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INTRODUCTION

Defendant Stewart M. Whipple, Jr. (Whipple) appeals from a judgment and an order denying his motion to vacate the judgment obtained by plaintiff Diamond Game Enterprises, Inc. (Diamond). We dismiss the appeal as to the judgment and affirm the order denying the motion to vacate the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Whipple is a former employee of Diamond. He was hired in 2003 to work on Diamond's sweepstakes phone card business. Whipple resigned in 2004 and Diamond believed that Whipple had set up a competing business with Diamond's then largest customer, Carl Eggersdorf (Eggersdorf). Diamond alleged that Whipple had misappropriated Diamond's customer list.

On October 6, 2004, Diamond filed a complaint seeking damages for misappropriation of trade secrets, breach of contract, intentional interference with contract and prospective economic advantage and breach of duty of loyalty. Whipple filed an answer on October 28, 2004 denying the allegations.

On December 1, 2005, Diamond filed a dismissal pursuant to a settlement agreement. The dismissal included a request for the court to retain jurisdiction to enforce the terms of the parties' agreement under Code of Civil Procedure section 664.6. The settlement agreement provided that Whipple was to pay $30,000 to Diamond: $25,000 upon execution of the agreement and $5,000 on May 18, 2006. Whipple also agreed that if Eggersdorf did not purchase $80,000 in product from Diamond during each of three separate four-month periods, Whipple would pay Diamond 50 percent of the difference between what Eggersdorf actually purchased and $80,000 for each four-month period.

Whipple failed to make the $5,000 payment. A dispute arose concerning the guaranteed portion of the agreement. Counsel for Diamond sent a letter to Whipple demanding performance. Whipple replied to Diamond's counsel on May 25, 2006 and

instructed Diamond to direct all post-settlement communications to his attorney, George Juarez (Juarez).[1]

Counsel for Diamond sent letters to Juarez at his law firm, Clarkson, Gore & Marsella (Clarkson firm) in Torrance, on April 14, May 24, and June 23, 2006. On June 29, 2006, Juarez sent a letter to Diamond's counsel with his new contact information in Lafayette, California.

There were several additional letters exchanged concerning the dispute. On January 26, 2007, Diamond's counsel sent a letter to Juarez responding to Juarez's January 11 letter. Diamond's counsel reiterated his belief that Diamond had satisfied its obligations under the settlement agreement, and Whipple had breached the agreement. He stated that Diamond was "prepared to take immediate action to enforce the Agreement." Diamond's counsel received no response.

On April 12, 2007, Diamond filed a motion to enforce the settlement and for entry of judgment. The papers were served on Juarez's office in Lafayette, and someone in his office signed for delivery. The motion was granted on May 8, 2007, and a judgment in the amount of $123,878.50 was entered on May 9, 2007. A notice of judgment was served by mail on Whipple through Juarez at Juarez's Lafayette office.

On September 28, 2007, Juarez on behalf of Whipple filed a notice of motion to vacate the judgment under Code of Civil Procedure section 473, subdivision (b), on the ground the judgment "was entered without proper notice and as a result of inadvertence, mistake or excusable neglect." The basis of the motion was that Diamond's motion to enforce settlement and entry of judgment was not served on Whipple's attorneys of record, the Clarkson firm, or on Whipple.[2] Juarez filed a supporting declaration in which

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[1] Whipple stated in an email: "George Juarez continues to represent me in this matter. He is out of the country at this time and I am told he will be returning in 10 days. Please direct your correspondence to his attention."

[2] The proof of service filed by Diamond indicated that it was served on Juarez in Lafayette.

he denied being served with the motion to enforce the settlement. He also asserted: "Although I was the principal attorney that worked on this case at Clarkson, Gore & Marsella, it was the firm and not me that was attorney of record for Mr. Whipple throughout the case. . . . At no time was a substitution of attorneys ever filed in this case to substitute me personally as Mr. Whipple's attorney of record, nor did I file any document with the Court indicating that I represented Mr. Whipple in this case."

On October 16, 2007, Diamond filed opposition to the motion to vacate the judgment. Diamond claimed that from the inception of the action, Juarez had been Whipple's one and only lawyer. He attended all hearings, signed all pleadings and correspondence, and was the point of contact. After the case was settled, Whipple directed Diamond to direct all post-settlement communications to Juarez. After Juarez moved his office to Northern California, he instructed Diamond to send all correspondence to his new office.

At the hearing, the trial court deemed Whipple's argument "gamesmanship," "disingenuous," and worthy of the "chutzpah award." The trial court commented concerning the motion, "When I finished reading this, I had a foul taste in my mouth and it wasn't from the old Starbucks coffee I was drinking. It was — I don't appreciate these sorts of games where you say we weren't attorney of record when you had all this time to file a substitution of attorney. All this time and you put yourself in a situation where you direct the plaintiff to do something and they follow that direction and then say aha, but we weren't the attorneys of record." The trial court further noted that Whipple was in a "checkmate situation," because if Juarez was not the attorney of record when Diamond served its motion for judgment, then Juarez was not the attorney of record when he filed the motion to vacate Diamond's judgment.[3] The trial court also rejected the claim that Juarez did not receive actual notice of Diamond's motion for judgment and made an express finding that Whipple through Juarez had actual notice.

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[3] Juarez filed a substitution of attorney form after Diamond pointed out this fact in its opposition to the motion to vacate.

DISCUSSION

A. *Judgment*

Whipple contends the judgment was void for lack of proper service, and the trial court abused its discretion in denying his motion to vacate the judgment. Diamond asserts that the appeal from the judgment is time-barred and the appeal should be dismissed. We agree with Diamond and dismiss the appeal from the judgment.

Rule 8.104(a) of the California Rules of Court provides that "a notice of appeal must be filed on or before the earliest of: [¶] (1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed; [¶] (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or [¶] (3) 180 days after entry of judgment." The time limits set forth in rule 8.104(a) are jurisdictional. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674; accord, *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901-902.)

Under Rule 8.108(c) of the California Rules of Court, the time prescribed by rule 8.104 to appeal is extended if a party serves and files a motion to vacate the judgment "within the time prescribed by rule 8.104 to appeal from the judgment."

The motion to enforce the judgment was granted on May 8, 2007; the judgment was entered on May 9, 2007; notice of entry of judgment was mailed to counsel for Whipple on May 11, 2007. Whipple had until July 10, 2007 to file an appeal from the judgment. He did not file his notice of appeal until November 2, 2007, nearly four months past the statutory deadline. It thus was untimely unless the time to file was extended by rule 8.108(c) of the California Rules of Court, i.e., if the motion to vacate the judgment was served and filed within the time for taking an appeal.

Whipple filed the motion to vacate judgment on September 28, 2007, well after the July 10, 2007 deadline for filing a notice of appeal. The time to file a notice of appeal was not extended and the November 2, 2007 notice of appeal therefore was untimely.

Whipple asserts, however, that he did not become aware of the judgment until he received a letter from an attorney in Oregon dated July 31, 2007, concerning the judgment Diamond had obtained. While Whipple's counsel, Juarez, in his declaration in support of the motion to vacate the judgment, indicated that he did not have notice that Diamond had filed a motion to enforce settlement, the trial judge made a finding that Whipple, through Juarez, had actual notice of the motion to enforce. In addition, Diamond sent the notice of judgment to Juarez on May 11, 2007.

Service of a document is presumed if a party had complied with the statutory requirements for service. (*Jones v. Catholic Healthcare West* (2007) 147 Cal.App.4th 300, 308.) The party serving the documents has no burden of proving actual receipt. (*Sharp v. Union Pacific R.R. Co.* (1992) 8 Cal.App.4th 357, 360.) Since the trial court made an express finding that Whipple had actual notice of the motion to enforce and a copy of the notice of judgment was sent, the record certainly supports a presumption that Whipple was served with a copy of the notice of judgment on May 11, 2007. (*Id.* at p. 361.)

We are not persuaded by Whipple's argument that the document served on May 11, 2007 did not start the 60-day time period running to file an appeal pursuant to California Rules of Court rule 8.104(a)(2), since it was not served on the Clarkson firm. Black's Law Dictionary defines attorney of record as "[t]he lawyer who appears for a party in a lawsuit and who is entitled to receive, on the party's behalf, all pleadings and other formal documents from the court and from other parties." (Black's Law Dict., 8th ed. 2004.) Juarez acted as Whipple's attorney from the time he filed an answer to the complaint on behalf of Whipple on October 28, 2004 until September 3, 2008, when he

became ineligible to practice law.[4] While Juarez worked for the Clarkson firm when the case was initially filed, after he left the Clarkson firm he continued to represent Whipple. On May 25, 2006, Whipple responded to a letter from Diamond's counsel and instructed Diamond to direct all post-settlement communications to Juarez. It also is compelling evidence that Juarez continued to represent Whipple when he filed the motion to vacate the judgment on behalf of Whipple. In *Baker v. Boxx* (1991) 226 Cal.App.3d 1303, 1309, the appellate court stated "[w]here the actual authority of the new or different attorney appears, courts regularly excuse the absence of record of a formal substitution and validate the attorney's acts, particularly where the adverse party has not been misled or otherwise prejudiced." The trial court aptly stated, "directing [Diamond] to do something and follow that direction and then say aha, but we weren't the attorneys of record," is pure gamesmanship that should not be rewarded.

The notice of appeal therefore was not timely as to the judgment. Accordingly, the appeal from the judgment must be dismissed. (*Hollister Convalescent Hosp., Inc. v. Rico, supra,* 15 Cal.3d at p. 674; *Beltram v. Appellate Department* (1977) 66 Cal.App.3d 711, 714.)

B. *Order Denying Motion to Vacate Judgment*

Whipple's November 2, 2007 notice of appeal was timely as to the October 29, 2007 order denying his motion to vacate the judgment. Thus, the question before us is whether the trial court abused its discretion in denying the motion. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257.)

Code of Civil Procedure section 473, subdivision (b) (section 473), provides that "[t]he court may, upon any terms as may be just, relieve a party . . . from a judgment . . .

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[4] Defendant sent the Clerk of the Court of Appeal a letter dated November 20, 2008 indicating that he had just learned that Juarez had been involuntarily suspended and deemed ineligible to practice law as of September 3, 2008. We allowed defendant time to obtain counsel and file a reply brief.

taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." In ruling on a section 473 motion, the trial court must exercise its discretion "'"in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."' [Citations.]" (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.) The provisions of section 473 must be liberally construed in favor of the determination of actions on their merits. (*Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th at p. 256.)

Whipple relies on the principle that "[u]nless inexcusable neglect is clear, the policy favoring trial on the merits prevails." (*Elston v. City of Turlock*, *supra*, 38 Cal.3d at p. 235.) He argues that since Diamond failed to provide clear evidence of inexcusable neglect, the policy favoring trial on the merits must prevail and his section 473 motion should have been granted.

Once again, Whipple's argument is, in the words of the trial court, "gamesmanship," "disingenuous," and worthy of the "chutzpah award." The rule is that, before relief under section 473 may be granted, *the party seeking relief* must demonstrate that the judgment was taken against him or her through mistake, inadvertence, surprise or excusable neglect. (See *Elston v. City of Turlock*, *supra*, 38 Cal.3d at p. 234.) In other words, the burden was on Whipple to prove excusable neglect, not on Diamond to prove inexcusable neglect.

In his reply brief, filed by newly retained counsel rather than Juarez, Whipple argues for the first time "that the obvious basis for Whipple's 473(b) motions was **surprise**," based on Juarez's not having received Diamond's motion to enforce the settlement. Whipple's claim of error based on surprise, presented for the first time in his reply brief, must be deemed waived. (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) In any event, the trial court clearly disbelieved Juarez's declarations that he did not receive notice of Diamond's motion. Whipple's suggestions to the contrary notwithstanding, it was his burden to show surprise, not Diamond's burden to show lack of surprise. (See *Elston v. City of Turlock*, *supra*, 38 Cal.3d at p. 234.)

In summary, Whipple has failed to demonstrate an abuse of discretion in the denial of his section 473 motion. The order granting the motion therefore must be affirmed.

DISPOSITION

The appeal from the judgment is dismissed. The order denying the motion to vacate the judgment is affirmed. Diamond is to recover its costs on appeal.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.